Central Law Journal.

ST. LOUIS, MO., JANUARY 31, 1919.

VALIDITY OF CERTAIN OBJECTIONS TO THE RATIFICATION OF THE EIGHTEENTH AMENDMENT TO THE CONSTITUTION.

The recent ratification of the eighteenth amendment to the Constitution, prohibiting the manufacture and sale of intoxicating liquors, together with the two important decisions of the Supreme Court, handed down Jan. 13, 1919, holding valid and enforceable the Webb-Kenyon Act and the Reed Amendment, respectively, serve to show how strongly the tide has set in to regulate matters of public health and morals through a definite extension of federal jurisdiction over a subject matter hitherto reserved for the exclusive action of the state.

We do not care to discuss at this time the various suggestions being offered as a ground for attacking the validity of the Amendment either as to the manner of its submission or as to the very peculiar provision for its enforcement by concurrent action of federal and state governments.

Two points which have been raised, however, offer very little encouragement to the adherents of the old order. First, that the amendment did not pass the Senate by a two-thirds' vote of the Senators; secondly, that ratification was not submitted under the referendum in states which have this very democratic institution.

The point that the amendment was not submitted by a vote of two-thirds of the entire membership of the Senate and the House has been made untenable by the recent decision of the Supreme Court in the case of Missouri Pacific Ry. Co. v. Kansas (decided January 7, 1919) to the effect that "two-thirds" of the House or Senate meant two-thirds of a quorum. This case just cited was a second attack on the validity of the Webb-Kenyon law and the single point raised was whether the act was void because not passed over the President's veto by a vote of two-thirds of all the members of the House and Senate. The court held that on the ground of a reasonable construction of the Constitution as well as on the ground of long continued usage on the part of Congress and acquiescence on the part of the people, the requirement as to a two-thirds' vote of a House which is necessary to override a president's veto meant two-thirds of a quorum. The court applied its rule and the reasons for it to the submission of constitutional amendments, saying that the requirement of Article V with respect to the submission of amendments and the requirements as to the necessary vote to override a veto "makes the practice as to the one applicable to the other."

The other objection that the ratification of the amendment in states which have the initiative and referendum may be suspended and nullified by a referendum of the legislative action to the people raises a very interesting question. When the Constitution was adopted the framers of that instrument very clearly intended to create a republican, i. e., a representative form of government. The democratic idea was foreign and repulsive even to the most liberal of the delegates to the Constitutional Convention. Jefferson himself declared that a "republican is the only form of government which is not eternally at open or secret war with the rights of mankind." The idea that the people shall act *en masse* was distinctly disapproved. The result is that it is very difficult sometimes to make the various new schemes for direct action and participation of the people in law-making, which have been adopted in many states, fit in, without friction, with the rigid requirements of the Constitution. But where the law of the State conflicts with a provision of the Constitution it ought not to be a serious question which should prevail.

The Constitution provides that a constitutional amendment "shall be valid to all intents and purposes as part of this Constitution when ratified by the legislatures of three-fourths of the several states." If a

legislature refers a resolution ratifying a constitutional amendment to the people, the legislature simply refuses to act on the subject of ratification. If the people should adopt the resolution by a majority vote such action could in no sense be considered as a legal ratification of the amendment unless the legislature also ratified. So on the other hand, if the legislature ratifies an amendment proposed by Congress, it would not seem possible for a state law or a provision of a state constitution to nullify the effect of that action under the provisions of the federal Constitution, which is the supreme law of the land, "anything in the Constitution or laws of any State to the contrary notwithstanding."

NOTES OF IMPORTANT DECISIONS.

SIMULTANEOUS APPROPRIATION OF TRADE-MARKS BY DIFFERENT PERSONS IN DIFFERENT PARTS OF THE COUNTRY.—Law is as interesting as life is. Its combinations of facts are always changing and presenting new angles and facets through which the light of the law shines with new and startling effects. All of which is illustrated by the case of United Drug Co. v. Theodore Rectanus Co., 39 Sup. Ct. 48. In this case it appeared that about the year 1877 Ellen M. Regis, a resident of Haverhill, Mass., began to compound and distribute in a small way a preparation for medicinal use in cases of dyspepsia and some other ailments, to which she applied as a distinguishing name the word "Rex"—derived from her surname. In 1898 she recorded the word "Rex" as a trade-mark under the laws of Massachusetts and in 1900 procured its registration in the United States Patent Office. In 1911 petitioner purchased the business with the trade-mark right, and has carried it on in connection with its other business, which consists in the manufacture of medicinal preparations, and their distribution and sale through retail drug stores, known as "Rexall stores," situated in the different states of the Union, four of them being in Louisville, Ky.

Meanwhile, about the year 1883, Theodore Rectanus, a druggist in Louisville, familiarly known as "Rex," employed this word as a trade-mark for a medicinal preparation known as a "blood purifier." He continued this use to a considerable extent in Louisville and vicinity, spending money in advertising and building up a trade, so that—except for whatever effect might flow from Mrs. Regis' prior adoption of the word in Massachusetts, of which he was entirely ignorant—he was entitled to use the word as his trade-mark. In the year 1906 he sold his business, including the right to the use of the word, to respondent; and the use of the mark by him and afterwards by respondent was continuous from about the year 1883 until the filing of the bill in the year 1912, in which petitioner seeks to enjoin respondent against the use of the trade-mark "Rex." The District Court granted the prayer of the bill, which judgment, however, the Court of Appeals set aside.

In affirming the judgment of the Court of Appeals in this case the Supreme Court has determined several important questions with respect to the law of trade-marks.

At the very outset Justice Pitney, writing the opinion of the court, denied petitioner's contention that a trade-mark was a property right in a strict sense. On this important point the court said:

"There is no such thing as property in a trade-mark except as a right appurtenant to an established business or trade in connection with which the mark is employed. The law of trade-marks is but a part of the broader law of unfair competition; the right to a particular mark grows out of its use, not its mere adoption; its function is simply to designate the goods as the product of a particular trader and to protect his good will against the sale of another's product as his; and it is not the subject of property except in connection with an existing business."

This is an important restriction of the use and purpose of a trade-mark. It is merely incident to the law of unfair trade and serves to give an effective remedy only in case where it is shown that one is trying to sell his goods as the goods of another. In other words one is not entitled to a trade-mark by priority of appropriation but by priority of use, and that this priority is effective only so far as the business of the prior owner extends. Therefore, if one adopts a trade-mark in Massachusetts, whose trade is confined at that time to that state, and another in Missouri adopts the same trade-mark for similar goods, without knowledge of the prior use, or notwithstanding its prior registration in the Patent Office, the latter will be protected as against the prior

owner when the latter comes into competition with the former in a field already developed by him. On this point the court said:

"It would be a perversion of the rule of priority to give it such an application in our broadly extended country that an innocent party who had in good faith employed a trademark in one state, and by the use of it had built up a trade there, being the first appropriator in that jurisdiction, might afterwards be prevented from using it, with consequent injury to his trade and good will, at the instance of one who theretofore had employed the same mark, but only in other and remote jurisdictions, upon the ground that its first employment happened to antedate that of the first-mentioned trader."

RIGHT TO APPROPRIATE UNCOPYRIGHTED NEWS MATTER AFTER FIRST PUBLICATION.—The secular press seems to have failed to note the basis for the recent decision of the Supreme Court enjoining the appropriation by a rival news organization of news matter belonging to the Associated Press published on bulletin boards and early editions of metropolitan papers. International News Service v. Associated Press, 39 Sup. Ct. 68. The Supreme Court did not hold that there was any property in uncopyrighted news matter after publication. Although some of the judges do discuss the question of property rights in such matter, Justice Pitney wisely avoids any such dangerous position as a basis for the decision in the principal case saying that "in order to sustain the jurisdiction of equity over this controversy, we need not affirm any general and absolute property in news as such."

Lawyers will appreciate the dilemma of the court in this unusual case. The law of literary property is that there is a property interest in the product of one's intellect and that this property right is inviolable until publication; that after publication the right of property is waived unless it is protected by copyright. On the other hand news is not literary property in any sense of the term, but a mere chronicling of events which in themselves are publici juris. Therefore news matter cannot be copyrighted so far as to prevent anyone else from reporting the same events. That being true the court was called on to say whether any right of the Associated Press had been violated by the action of the International News Service in copying news from bulletin boards, retelling it in different language and selling it to its clients, and if so whether an injunction would lie to protect such a right.

It was argued by counsel for the International News Service that if the Associated Press had no property right in the news which it had gathered at great expense, then a court of equity could not act since equity "concerns itself only in the protection of property rights."

Justice Pitney displayed his usual acute discernment of legal principles by showing that any right which has a monetary value is protected by equity although the right itself may not be technically a property right. Thus the right to acquire property by honest labor or to conduct a lawful business is as much entitled to protection as the property acquired or the good will established. "It is this right," says Justice Pitney, "which furnishes the basis of jurisdiction in the ordinary case of unfair competition."

The court therefore justified the injunctive relief granted in this case on its power to prevent unfair competition. But even here the majority of the court did not have easy sailing. For Justice Holmes, who dissented, interposed the argument that if there is no property in news matter, especially after it is published, any one may repeat it who wishes to do so, without restriction. Defendant's act in doing what everyone else may do would become objectionable as unfair trade only when it is shown that it attempted to palm off such news as the product of its own efforts and that this could hardly be possible if such news had already been published. In other words, news is news only when it is fresh, but is history when it is old. Justice Pitney replies to this argument, however, as follows:

"It is said that the elements of unfair competition are lacking because there is no attempt by defendant to palm off its goods as those of the complainant, characteristic of the most familiar, if not the most typical, cases of unfair competition. Howe Scale Co. v. Wyckoff, Seamans, etc., 198 U. S. 118, 140, 25 Sup. Ct. 609, 49 L. Ed. 972. But we cannot concede that the right to equitable relief is confined to that class of cases. In the present case the fraud upon complainant's rights is more direct and obvious. Regarding news matter as the mere material from which these two competing parties are endeavoring to make money, and treating it, therefore, as quasi property for the purposes of their business because they are both selling it as such, defendant's conduct differs from the ordinary case of unfair competition in trade principally in this, that instead of selling its own goods as those of complainant, it substitutes misappropriation in the place of misrepresentation, and sells complainant's goods as its own."

Having shown the applicability of the doctrines of unfair competition to this case Justice Pitney with great force and clearness pro-

ceeds to show the fault in the argument that because the public may appropriate and communicate news that has been published without let or hindrance, that therefore defendant has the same right to do so. The learned justice said:

"The fault in the reasoning lies in applying as a test the right of the complainant as against the public, instead of considering the rights of complainant and defendant, competitors in business, as between themselves. The right of the purchaser of a single newspaper to spread knowledge of its contents gratuitously, for any legitimate purpose not unreasonably interfering with complainant's right to make merchandise of it, may be admitted; but to transmit that news for commercial use, in competition with complainant—which is what defendant has done and seeks to justify—is a very different matter. In doing this defendant, by its very act, admits that it is taking material that has been acquired by complainant as the result of organization and the expenditure of labor, skill and money, and which is salable by complainant for money, and that defendant in appropriating it and selling it as its own is endeavoring to reap where it has not sown, and by disposing of it to newspapers that are competitors of complainant's members is appropriating to itself the harvest of those who have sown. Stripped of all disguises, the process amounts to an unauthorized interference with the normal operation of complainant's legitimate business precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not; with special advantage to defendant in the competition because of the fact that it is not burdened with any part of the expense of gathering the news. The transaction speaks for itself and a court of equity ought not to hesitate long in characterizing it as unfair competition in business."

DOES LANDLORD'S KNOWLEDGE OF AND ACQUIESCENCE IN IMPROVEMENTS MADE BY TENANT GIVE MECHANICS A LIEN ON PROPERTY?—We believe the New York Court of Appeals has announced a very dangerous and illogical rule of law when it declared in the recent case of Gates & Co. v. Empire City Racing Association (Jan. 7, 1919), 60 N. Y. L. J. 1285, that material and labor furnished to a lessee may give to the laborers and material men a lien thereon if done with the knowledge and acquiescence of the owner.

There was nothing in the provisions of this lease that should change the general rule that lessor is not responsible for obligations contracted or incurred by the lessee in his use of the leased property. In this lease, it is true, it was provided that lessee should not make changes or improvements on the property without the owner's consent. This provision, which is common in all leases of business property, does not establish any privity of contract between the landlord and tenant which, if such consent is given, binds the landlord for the value of any improvements contracted for by the lessee. The tenant is not the agent of the landlord. The tenant owns an estate in the land as independent of that of the owner except for restricting covenants, as that of a tenant for life. The tenant is the "owner" of the property, the leasehold, and his interest in the property is the only interest to which a mechanics' lien can possibly attach where the contract for such repairs or improvements is made by the lessee.

To hold a landlord liable for repairs on improvements made to leased property under a mechanics' lien statute it should be shown not that the landlord *consented* to the *tenant's* making the repairs, but that the repairs were made on *his* order or that he led the contractor to believe that he desired them to be made on the property and that he joined with his tenant, expressly or impliedly, in the contract for labor and material furnished for that purpose.

AN INTERESTING DEBATE ON REFORMING PROCEDURE BY RULE OF COURT—EXCERPTED FROM THE MINUTES OF THE LAST MEETING OF THE MISSOURI BAR ASSOCIATION.

Debates on reforming procedure are not uncommon at meetings of state bar associations. Nor was the debate at the last meeting of the Missouri Bar Association last September at St. Louis, in any way unusual; but it was typical and for that reason we are setting it out verbatim from the reporters' notes in advance of the published proceedings.

Just a word about the characters in this drama. Hon. David H. Harris of Fulton, Mo., is a circuit judge of high repute and devoted in his labors to improve the administration of justice. He is also chairman of the Judiciary Committee of the Missouri Bar Association. Hon. Robert Lamar, Houston, Mo., is a former Con-

gressman and an able and aggressive lawyer whose practice carries him into all parts of the Ozark Mountain regions of Missouri. Hon. John M. Atkinson, of St. Louis, was formerly Chairman of the Public Service Commission of Missouri. Hon. J. W. Halliburton is one of the oldest and ablest lawyers in the great mining district of Southwest Missouri. Hon. Frederick W. Lehmann of St. Louis, is a former president of the American Bar Association and former solicitor-general of the United States.

A few others participated in the debate with short speeches. The writer was one of these. As these speeches contributed very little, if anything, to the result, they are omitted.

The interesting thing about this debate was that it was all impromptu. There was no stage setting and no previous arrangement. The Judiciary Committee, of which Judge Harris was chairman, had worked energetically to propose with unusual care a bill of 104 sections to improve procedure. The committee had no idea that the anticipated discussion of their report was to take such an unexpected aspect resulting in the substitution of an altogether different scheme of reform. The storm broke after Judge Harris had presented his report. We report the proceeding at this point verbatim:

JUDGE HARRIS: The Association will remember that two years ago we spent nearly a whole day threshing over practically these very sections before they were presented to the Legislature. There have been a few unimportant amendments suggested by the committee. I think, however, I am correct in saying that the bill as presented here is the bill as finally presented to the Legislature two years ago. Now, it has one hundred and four sections. Shall we take it up in detail or dispose of it as a whole?

MR. LAMAR: Before considering it I would like to be heard a moment, Mr. President and gentlemen, with reference to the proposals made by Judge Harris.

I want to say at the outset that if that method of presenting this matter to the Legislature is agreed upon by this Association, I have no objection to the suggested changes.

But the history of the matter is about this: In the first place, the Major Commission, appointed some four years ago, recommended those suggested changes in the Code. Later on, at Kansas City, another commission was appointed, authorized by this body, consisting of one member from each Congressional District in the State, to go over the same ground practically. This commission brought in a report to the meeting of this Association held in 1916 in St. Louis, where this matter was threshed out, and several sections agreed upon. The bill was introduced in the Legislature and the House passed it; but it failed to pass the Senate.

Now, gentlemen, before we enter upon consideration of whether we are going to recommend this statutory method of remedying our procedure, we ought to see if we can discover an alternative; an alternative that may be better, and easier of passage.

In 1913 it was the unanimous report of the Committee on Procedure at Kansas City (save and except Judge Robertson of Mexico), that the Supreme Court of this State should be given the right to prescribe rules of procedure for courts of record; and this Association, without a dissenting vote, adopted it. I am loath to see this Association take what I conceive to be a backward step, because I believe the true method of solving the difficulty is by giving to the highest court of our State the right to prescribe and promulgate rules of procedure. (Applause.)

The American Bar Association for a number of years has been on record favoring that proposition; and a bill of that sort framed by the American Bar Association was presented to Congress by Hon. T. M. Shelton, Alton B. Parker, Elihu Root and Ex-President Taft, and others. The Lower House has passed that bill, I understand; it has been reported favorably more than once by the Judiciary Committee of the Senate, and only because of lack of time has it failed to pass, and because of the fact that other more pressing matters have demanded attention since that time. And only recently at the meeting of the American Bar Association they again went upon record as favoring the proposition.

It is not a backward step, but a progressive one—one placing this Association in line with the thought of the leading lawvers of the United States and, in my judgment. it is the solution that in the end must come. We are simply frittering away our time and nibbling at straws to recommend this thing and that thing to the Missouri Legislature. I believe the Supreme Court should be given the power to prescribe the rules of procedure, and I believe that the Legislature will favor such a bill, and I have not the slightest doubt that the court would call to its aid the leading lawyers of the State, and from time to time remedy the defects in our code, as the necessity may arise.

Why should we not adopt that method, gentlemen? In the first place, it is flexible; secondly, it places us in line with the American Bar Association and with the Bar Associations of a number of States of this Union. It places us in line to realize what I conceive to be the ideal in procedure; a procedure that will be uniform throughout the country. After the Supreme Court of the United States shall have prescribed rules under the authority of an Act of Congress, recommended by the American Bar Association, as they have already done in equity cases, then the different States of the Union can fall in line, and, so far as may be, adopt uniform rules of procedure, modifying it, of course, to meet the necessities of each State, so that a lawyer in one State when he is required to go to another State to appear before a court in that State will appear with some knowledge and understanding of the rules of procedure of that State, and not need to employ an expert in pleading and practice to assist him.

JUDGE HARRIS: Mr. Chairman, I move the approval of the bill as reported here and which received the endorsement of this Association at its meeting in Kansas City.

(Cries of "Second the motion!")

MR. LAMAR: Now Mr. President, I desire to move as a substitute for that motion, that this Association go on record as recommending to the Missouri Legislature the passage of a bill giving to the Supreme Court of this State the power and authority to prescribe and promulgate rules for the procedure in courts of record in this State.

(Cries of "Second the motion!")

JUDGE HARRIS: May I be permitted to say a word or two in reference to this matter?

THE CHAIRMAN: Judge Harris.

JUDGE HARRIS: I trust in the first place the matter will be thoroughly discussed, because it is too important to be passed over with small consideration. I protested against the consideration of this very proposition in the closing hours of the Association last year, because there were only some fifteen or twenty people present, and I did not believe it was right to discuss, or rather to determine, the matter, with so small a representation from the Bar of the State.

Gentlemen, it occurs to me that this proposition is impracticable in the State of Missouri, for two or three reasons. The first of these reasons is this: Our Supreme Court is already, right now, between two and three years behind with its work. They are not in a position to give any time to the matter, the time essential to do it right; and I believe that we should devise some system of procedure in our appellate practice that will enable our appellate courts to clear their dockets and catch up with their work before we place any additional burden upon them.

In the second place, I do not agree with my Brother Lamar in the proposition that courts are more flexible and more likely to respond to any real public demand for reformation than is the Legislature. Now, it has been asserted time and again that the reform procedure in equity cases promulgated by the United States Supreme Court is illustrative of what our appellate courts may do and can do if left to themselves; but I want to call your attention to the fact that the Supreme Court of the United States was eighty years in doing this; and they acted then only in response to a strong and insistent demand on the part of the people. And I do say that Congress would not have been as slow about it as was the Supreme Court.

Gentlemen, I do not believe it is practicable for another reason, and that is this: That our procedural law in this State, at least, is so interwoven and intermixed with our substantive law that such a measure as this would lead to interminable conflict and litigation in the courts. It is proposed by this proposition, as I understand it, to have the Supreme Court not only regulate the practice in its own court and the courts of appeal, but to regulate the practice in the Probate Court, in the County Court, in the justice of the peace court, in all the courts of the State.

Now, gentlemen, it seems to me that the proper thing for us to do now is this: We have approved this bill which I have just submitted once, we have approved it twice, we have amended it, we have changed it in some parts. It now represents the consensus of opinion as to the rules that ought to be enacted in reference to these particular matters. Let's put it through the Legislature if we can. Then, when the proper time comes, if the Legislature endorses the proposition to put into the hands of the Supreme Court this great power, there is nothing to prevent that court then from adopting these sections of the statutes as a part of the court rules. In this way we can indicate to the Supreme Court the wishes of the Bar with reference to these particular matters.

It has been suggested by Mr. Lamar that if this power is given to the Supreme Court they will consult the leading lawyers of the State. Well, they ought to, and they certainly ought to pay attention to the wishes of an Association like this, composed, as it is supposed to be, of a majority of the lawyers in the State; but—I am speaking kindly, gentlemen, but I am speaking the facts—if the Supreme Court doesn't move faster in such a matter as this, if the power is given them, than they have moved in the amendment of their own rules, which individual members of the court, if you will ask them, will tell you ought to be amended, we will not get action any quicker than we could have obtained from the Legislature; and perhaps not so quickly.

MR. JOHN M. ATKINSON: Mr. President and gentlemen of the Bar Association, St. Louis: Hitherto I have been in favor of code revision, but my views have undergone a change.

What has been the history of the other States on this question? New Jersey wrestled with this question until she passed a Short Practice Act in 1910 or 1911, a simple little act of thirty-one or thirty-two sections; and with that act the Bar Committee that prepared the act wrote and drafted a set of rules for the Appellate Court to follow until they prescribed their rules in lieu of the ones adopted by the Legislature. I wrote the Clerk of the Appellate Court of New Jersey a year and a half to two years ago and I made a study of the whole subject. I found the Appellate Court of New Jersey had made only one or two amendments to the rules adopted by the Legislature, which had been prepared by the New Jersey Bar Association of that State.

The State of New York appointed a commission that made a thorough investigation of the subject, composed of eight of the ablest lawyers in the State of New York; they published four volumes upon the subject, that compared the rules of the English practice act, the equity rules in the United States Supreme Court, the New Jersey rules, the rules of, possibly, Connecticut; and that commission, after one of the most thorough and painstaking investigations that has been made by an able commission of lawyers in the United States, reached the conclusion that a code composed of more than a thousand sections, like that of New York, and being constantly added to and changed, was confusing to the Bar of that State, and they recommended a short practice act of some seventy-two sections.

Now, I say that we do not move forward when we recommend this code revision. I have been in sympathy with Mr. Manley O. Hudson all the time in this fight; I even had the temerity to prepare a bill and I sent it to the Legislature at the last session; I think I submitted a copy of it to my friend Mr. Lehmann and Mr. Judson; I merely had it introduced for the purpose of education. You will find it among the bills, composed of sixty-two sections, which places in the hands, in the power, of the Supreme Court of this State the duty of prescribing rules and regulations for the practice in the Circuit Courts and in the Courts of Appeal and in the civil courts of this State.

Now, gentlemen, I have confidence in the Supreme Court of this State that they will prescribe, calling to their help and aid the members of the Bar of this State, a simple set of rules which will guide and direct the practice in this State.

Pardon me for this personal reference: the Public Service Commission of this State, of which I was chairman, adopted some twenty-odd rules providing for simple procedure. I have never yet known that commission to dismiss a single case for failure to strictly comply with the rules, when the spirit of the rules had been complied with; and you will find that to be the disposition of the courts of this State. In my opinion, gentlemen, if this Bar Asso-

ciation will adopt a simple practice act, placing in the hands of the Supreme Court the making of rules, providing that the act shall not become effective for some six months or twelve months after the adjournment of the Legislature, to give the court time to get the committee of the Bar Association and the lawyers together, you will have secured a flexible code of simple rules such as you will find in Connecticut, Michigan, and other States; you will find the matter simplified a thousandfold more than by the adoption of this proposed code revision you are coming in here with now.

MR. HALLIBURTON: Mr. Chairman, I have listened to these gentlemen talk about this New Jersey set of rules—I was a member of Governor Major's Commission, and I had those rules before me while I was working on that commission, and it is the most complicated set of practice rules I ever saw. As a matter of fact, it is nothing on earth but simply the New Jersey rules of practice; any man that would take them and read them would find out that they are much more complicated than anything we have.

Now, the members of the Bar out in the State are against turning the making of these rules over to the Supreme Court. Some members of the Supreme Court for the last five or six years have been trying to provide that you can't take an appeal to an appellate court except by permission of some appellate judge or by the court, A part of this Association was opposed to that proposition flat-footedly, and will fight it tooth and toenail.

Here's what I think about Mr. Lamar's proposition as it is presented here: It isn't a proposition; it's simply that we suggest to the Legislature that they put the rules of practice in the hands of the Supreme Court. Now, if you want to suggest something practicable, why not come here with a short practice act, and let the Supreme Court make a revision of those rules? I don't want to be put in the position that the Supreme Court can say I can't go into court and protect the rights of my clients. And there are some other things, too. Their own rules aren't perfection, not by a great deal. And they haven't changed them very much; they have simply, in the last few years, construed them in the interests of the litigants. But for a great many years here under their own rules they were kicking men out of court day after day and week after week that in my judgment had substantially complied with their rules. I don't know; I don't think the Supreme Court as a body knows much more about what should be in the practice act than the members of the Bar do. They are very honest and estimable gentlemen and good lawyers, but they are just like we are; they come from among us. And I think the members of the Bar ought to have something to say about what it should be.

MR. FRED. W. LEHMANN, of St. Louis: There has grown up in recent years a very distinctive demand, which is practically universal in the country, for a simplification of legal procedure; procedure which for many, many years has remained absolutely unchanged.

Assuming that forty six years ago, when I was admitted to the Bar, I was qualified to conduct a law suit and had gone to sleep at that time, and waked up now, I could apply the knowledge I had of technical procedure at that time; we haven't made a step in advance since then. There has been progress made in every other line of business, save that of court procedure.

Now, a question is raised here as to the constitutionality of such an act. I have only to call the attention of the gentlemen to the fact that the Supreme Court may now make rules; it exercises that power today, and there isn't any constitutional limitation upon the scope of that power. There is residing in the Legislature a supervisory power superior to that of the courts; and though an act of the kind suggested by Mr. Lamar were to be enacted, it would still be within the power of the Legislature at any time to nullify any rule or to impose by its own enactment a rule upon the court. So we have got no question whatever of constitutional power. As has been well suggested by Mr. Robbins, we have created administrative tribunals without number, giving them comprehensive powers, judicial or quasi-judicial in their nature over important lines of business, especially in the carrier business; and in every case we have permitted those tribunals to prescribe the rules of their own procedure; and Mr. Atkinson has stated a fact which attests the propriety of a course of that kind: the fact that during the entire existence of The Public Service

Commission of this State no case has been dismissed upon formal grounds.

Now, what is the objection to our present procedure? One thing undoubtedly is multiplicity of detail; but that isn't the principal objection. The main objection is the rigidity and the inelasticity of those rules of procedure. The court can not mitigate the hardships of them, because it is always confronted with the proposition *lex ita scripta*, "so the law is written and we must obey it."

We have had discussion in this State over some cases where convictions in criminal cases have been reversed because, in the merely formal part of the indictment, the word "the" is omitted. What justification is there for such a decision? The only justification is that it was prescribed by the Constitution, and therefore the requirement was rigid, inelastic and unescapable.

Now, if that had been a rule of court, I venture to say no tribunal would have ever set aside a solemn finding upon a consideration of that kind. And you have made a step forward of the greatest possible importance when you have endowed the Supreme Court of this State with power to prescribe rules of procedure for all the courts, even if they were to adopt the very rules that are now in effect. I say that would be a step forward, because thoes rules being rules of their own formulation, prescribed by them, for the convenience and the dispatch of business, and not arbitrary and hard-and-fast rules imposed upon them by the law-making body, they would interpret these rules in the interest of the litigants.

Now, the rules of procedure to which we have reference do not mean rules of right. They do not mean that the Supreme Court or any court shall determine whether a man has a right of appeal. The right is given by the Constitution, or may be given by the statutes; but we do say that the court may prescribe the mode of giving effect to that right: and right there is where we need a good deal of relief. We are more than two thousand years behind the times in that. When Paul was condemned by Festus to be scourged, he said, "It is not lawful to scourge a Roman citizen; I appeal unto Caesar," and his appeal was effected by the very declaration of his purpose, without anything more.

And I would simplify the procedure of the law of appeal to that extent: that we may get up to where the world was two thousand years ago.

In England I have heard it stated by a Justice of their High Court, that in a criminal case where a certain man had been convicted before him; he simply turned to the man when the jury had rendered the verdict, and said, "Do you appeal?" The man said, "I do, my lord." He turned to the clerk: "Let the appeal be entered." That was all there was.

Now, here in this country in a great many States, and it is true in this State, we would begin to study how to carry that appeal into effect; it should not require one moment of a lawyer's time nor ought it to require one moment of the time of the Supreme Court to determine whether or not an appeal has been properly perfected. The very fact that the man was there before them thinking at least of taking an appeal and perfecting one should give him a hearing. That would go far to expediting business. You will have a much greater expedition of business in all the courts when the mode of that business is simplified.

Now, you talk about vesting an enormous power in the courts by giving them authority to determine how business should be conducted. Why, it is rather remarkable; you have given to those same courts the power to condemn a man to death, and you don't think of withdrawing that power from them: but you say it won't do to let them alter the mode of procession to the gallows! You can kill, but you must have a legislative method of prescribing the adjusting of the noose!

When it is said, "The legislature won't do that;" "they won't do this," or "it is a good thing to be done but you can't accomplish it,"—I would reply that, if we are agreed that this is a good thing to be done then let us determine upon doing it, and stand by our program; and if we can't accomplish it today we will tomorrow. At any rate make headway by waiting rather than by proceeding piecemeal.

(Applause.)

JUDGE HARRIS: Mr. Chairman and gentlemen, to all good things there must be an end; and I want to say just one word in conclusion. I agree with nearly everything that Brother Lehmann has said, and Brother Atkinson, and Brother Lamar; there's simply a difference of opinion as to how to accomplish the desired end.

Now, my friend Lehmann has suggested that the power in the Supreme Court to make these rules will remedy all the evils that we now complain of; and yet I say to my friend Lehmann, and I say to my friend Atkinson, and I say to my friend Lamar that the rules in this State that have caused most criticism in the administration of the law and in the administration of justice are the rules of evidence. They, in large part, are court-made, and the court has the right, and has had the right since the admission of this State in the Union to change them. The six sections of the statutes which we are now seeking to have amended are simply modifications of the common law which the Legislature of this State has forced upon the courts. Mr. Elihu Root has recently said in an address that this country is a hundred years behind nearly every civilized nation on the globe in the administrationn of our law, so far as the rules of evidence are concerned.

By our rules of evidence we bottle up a man and keep him from telling things in the natural way and the way that is easiest to him; and those rules, Mr. Lehmann, are court-made; and the Supreme Court of Missouri has had since 1821, the right to change them and hasn't done it. And yet you say we will get relief quicker from the Supreme Court than you would from the Legislature! Those equity rules of the United States Supreme Court that I have heard Brother Lehmann commend were eighty years in being formulated.

In the first place, gentlemen, what will a rule of court be? If we give to the Supreme Court the authority to make the rules of practice, not only in their court but in the Circuit Courts, the Probate Courts, the County Courts, the justice of the peace courts, what will a rule of the Supreme Court be? Is it something to govern practice by which we shall be guided, or is it simply an indefinite, flexible and changeable suggestion that the court may change in any particular case in response to the eloquence or the persuasion of accomplished counsel?

If a rule is not something to be gone by, to be guided by, to be controlling in every case, then it it not a rule. It must be controlling so far as any particular case is concerned. You may see the imperfections in it and repeal it and change it in its application to future cases, but so far as your present case is concerned, it isn't a rule if it can legally be set aside. Of course a rule can be liberally or it can be strictly construed, but it at least should be definite and controlling as to its terms, otherwise you make it a farce, for when a person goes into court he would not know what was to be depended upon. So much for your so-called "flexible" rules of court.

I make this suggestion in conclusion. Whatever we agree upon, it ought to be formulated here and presented to the special Legislative Committee, so it may have its consideration and approval, if possible. But I do say to you that, in my opinion, we will retard relief in this State if we fail to go before the Legislature and ask the amendments to our civil code suggested by this bill. If, in the future, the Supreme Court be given authority to pass rules governing all matters of practice in all courts of record, then what this Bar Association has recommended in this bill and may have been enacted by the Legislature into law will be a suggestion to the Supreme Court, at least, of the opinion and wishes of the Bar Association of the State of what is proper.

THE CHAIRMAN: Mr. Lamar, the mover of the substitute, closes the debate.

MR. LAMAR: In answer to the suggestion that my proposition wouldn't be as easily got through the Legislature as this list of bills we have here, I want to say this: although I never was a member of the Legislature, I believe it would be much easier to get through the Legislature than would this long list of bills. I live out in the country; I attend the courts in some six or seven counties in my section, and for some four or five years since this proposition has been studied and discussed by the American Bar Association and in the law journals; I have discussed it with the Circuit Judges and the lawyers down there and, in the main, they agree that it is a thing which ought to be done.

Gentlemen, if the Supreme Court is given power to make rules of procedure there is no reason to fear any radical changes in procedure. The law we now have will continue in existence as rules of court until they are changed by rule. The Supreme Court won't overturn all the rules of practice we have now at one time and give us anything revolutionary. I am sure

of that—but here and there, as this or that proposition confronts them, this and that section will be modified by rule until, in a few years, little by little, in an orderly, systematic way, the Supreme Court, from their own experience and the experience of the Bar, will work out an elastic system of efficient rules.

If we go before the Legislature with this proposition giving to the Supreme Court the power to fix the rules—not the substantive law, not the right to take an appeal—but the power to regulate the methods of practice, then the responsibility for future conditions in the administration of justice is fixed and it cannot be avoided. If that is done, then the Supreme Court can not say that the fault lies somewhere else, because it will lie within their power to make and fix rules that will expedite the transaction of business as well as bring about substantial results to the litigants; and I hope the substitute will prevail.

(Cries of "Question!")

THE CHAIRMAN: Gentlemen of the Association, the question arises in this way: The committee has reported the civil procedure sections. A motion has been made to adopt them, and it has been seconded. Thereupon a substitute is offered by Mr. Lamar: That the Association recommend to the Legislature that it pass an act authorizing the Supreme Court to formulate and create rules of practice. The adoption of the substitute eliminates any discussion of the report of the committee. If the substitute is lost the question recurs as to the adoption of the report of the committee.

The first question, therefore, is upon the substitute offered by Mr. Lamar.

(Thereupon an aye and no vote was taken.)

THE CHAIRMAN: The chair is in doubt. I will ask all the gentlemen in favor of adopting the substitute to get on this side of the room. (Indicating the south side.)

(Thereupon, at the request of the Chairman, the reporter counted the members voting for the substitute, and reported thirty-one.)

THE CHAIRMAN: Now, gentlemen, all of those opposed to the substitute offered by Lamar will please remain on this side (indicating the north side of the room), and arise.

(Thereupon at the request of the Chairman, the reporter counted the members voting against the substitute, and reported thirty.)

THE CHAIRMAN: The vote is thirty-one for the substitute and thirty against; the substitute is adopted.

Thus ended most dramatically a memorable debate on one of the live subject now agitating the profession.

In this particular case, the Missouri Bar Association acquiesced heartily in the results of the very close vote taken and a committee of which Mr. Lamar is chairman has just presented to the Missouri Legislature, now in session, a short practice Act giving to the Supreme Court the power to make and amend rules of pleading, practice and procedure excepting such matters as to which the legislature has prescribed a definite rule.

ALEXANDER H. ROBBINS.

ST. LOUIS, MO.

PARTNERSHIP—REAL ESTATE.

KREIS et al. v. CARTLEDGE.

Supreme Court of Pennsylvania, July 17, 1918.

104 Atl. 855.

While partnership realty is considered personalty for partnership purposes, it is realty so far as the heirs and legal representatives of the partners are concerned.

FRAZER, J. Thomas Cartledge died in 1898, leaving a will in which he gave to his son, Alfred B. Cartledge, his one-half interest in a partnership engaged in business under the name of Pennock Bros. The remainder of his real and personal estate he distributed, one-third to his wife for life, with remainder to his daughter, Elizabeth Kreis, and son, Alfred B. Cartledge, in equal parts; the other two-thirds to the above-named daughter and son, appointing the latter executors with power "to sell any or all of my real estate at public or private sale upon such terms as they shall deem most advantageous." Among the property belonging to testator's estate was his one-half interest in the real estate, No. 1514 Chestnut street, Philadelphia, occupied by the firm of Pennock Bros.

Following the death of testator, the widow and executors joined with the survivor of the old firm in executing a lease of these premises from June 8 to August 1, 1908, to Alfred B. Cartledge and J. L. Pennock, new partners in the firm of Pennock Bros., at the annual rental of $3,000, and also the payment of interest on a mortgage on the demised premises, together with taxes and water rent. The lease contained a provision that in absence of a notice of termination at the end of the term it should continue in force from year to year until ended by 30 days' notice, by either party, previous to the expiration of a current term. The active work incident to settlement of the estate was left to defendant, Alfred B. Cartledge, and no formal account was filed by the executors, nor was the estate divided between the parties; it being treated as a whole by mutual consent and the income apportioned.

Defendant attended to the business affairs of the family and collected rents from the various properties, including that leased to Pennock Bros. No claim is made that his accounts were not properly kept or the proceeds fully accounted for. The lease to the partnership continued to run for a period of 18 years without change of terms. In the meantime the property had greatly enhanced in value, and plaintiffs now contend the rental paid since 1901 was totally inadequate and seek to procure payment from defendant for one-half the difference between the rental value received and what they contend would be a fair rental of the property based on the increased market value; their theory being that defendant occupied toward them a relationship of trust, which imposed on him the duty to suggest an increase in rent by the firm of which he was a member, and, in failing to do so, profits by his wrong to an extent represented by his one-half interest in the partnership. Plaintiffs contend further that defendant, having acted in the capacity of executor, the burden was on him to show he exercised the degree of care and business judgment in conducting the affairs of the estate a prudent business man would exercise in the management of his individual property. The court below excluded evidence to show increase of rental value and dismissed the bill, from which action this appeal was taken.

(1, 2) That the lease when made was reasonable and called for a fair rental based on value at that time is undisputed; also that, while plaintiffs left the management of their affairs to defendant, they received notice of an increase in the assessment of the property for taxable purposes, were regularly consulted with regard to the matters in which they were jointly interested, accounts submitted to them and settlement made each year, and no request was made by them at any time for an increased rental. Although the lease was signed by the son and daughter as executors of their father's estate, they had no control over the realty as such. While real estate belonging to a partnership is considered personalty for partnership purposes, it is realty so far as the heirs and legal representatives of the partners are concerned. Haeberly's Appeal, 191 Pa. 239, 43 Atl. 207. Furthermore, it does not appear from the record that the real estate in question, though owned by the former partners jointly, was held by them for partnership purposes and in absence of such evidence we must presume it was not partnership property. Shafer's Appeal, 106 Pa. 49.

(3-5) Aside from this question the old firm was dissolved, the business given over to the sons of the former partners, and the realty retained; so that, even if it were formerly partnership property, it ceased to be such on the dissolution of the old firm, consequently, for the present purposes, it must be considered realty. In absence of necessity, such as sale for payment of debts, and on default of express provision in the will, an executor or administrator as such is without authority or control over the realty belonging to the estate. Such property descends directly to the heirs, or to the persons designated in the will of testator. Although an executor or administrator may undertake to collect rents received from real estate, he does so, not in his official capacity, but merely as agent for the heirs. Penna. Co. for Ins., etc., Appeal, 168 Pa. 431, 32 Atl. 25, 47 Am. St. Rep. 893; Herron v. Stevenson, 259 Pa. 354, 102 Atl. 1049.

(6) In this case the will contained a provision authorizing the executors to sell real property belonging to the estate; there is, however, no absolute direction to sell sufficient to amount to a conversion of the realty, and no sale has been made, nor did necessity for sale arise. The estate was solvent and the personal property sufficient to satisfy all liabilities. Neither did the will contain a trust, or other provision, whereby it might be inferred the power of sale was intended to continue indefinitely, and we find nothing in the case imposing upon defendant the duties or obligations of an executor with reference to the property in question. Under such circumstances, the power of sale must be limited to the ordinary

purposes incident to the settlement of the estate, and will not be construed as extending the power of the executors over the real estate for an indefinite period. Penna Co. for Ins., etc., Appeal, supra; Eberly v. Koller, 209 Pa. 298, 58 Atl. 558.

(7-9) Defendant in continuing to act for the others in the care and management of the common property for a period of 18 years was acting merely as agent. As such he was bound to act in good faith and with loyalty to his principal, and could not be permitted to deal with the subject-matter of his agency, so as to make a profit out of it without disclosing all the circumstances to his principal. Everhart v. Searle, 71 Pa. 256; Persch v. Quiggle, 57 Pa. 247; Wilkinson v. McCullough, 196 Pa. 205, 46 Atl. 375, 79 Am. St. Rep. 702; 2 C. J. 694, § 354. The court below found there was no evidence of concealment or fraud on his part. Plaintiffs were aware defendant's interest as a member of the lessee firm was antagonistic to theirs as landlord, had ample opportunity during the 18 years to discover for themselves whether or not a fair income was being realized from the property, in view of the increase in valuation subsequent to the date of the lease, and, if not, terminate it at the end of an annual period. No higher duty was imposed upon defendant as tenant in common since, in that capacity, he did not sustain the relation of agent to the others, except so far as was expressly or impliedly agreed between them. Caveny v. Curtis, 257 Pa. 575, 101 Atl. 853.

The judgment is affirmed.

STEWART, J., dissents.

NOTE.—*Title to Real Estate Conveyed to Partnership.*—The instant case enforces what is called the Pennsylvania Doctrine, where it has been held that, when real estate is purchased by a partnership and title taken in the partners individually, the common law doctrine is that they take the property as tenants in common, so far as purchasers and creditors are concerned and parol evidence to put upon it another quality is inadmissible. Stoner v. Stoner, 180 Pa. 425, 36 Atl. 921, 57 Am. St. R. 654; Cundey v. Hall, 208 Pa. 335, 57 Atl. 761, 101 Am. St. R. 938.

But where the interests of heirs are involved, this may be rebutted by showing that the property was bought by partnership funds, treated as partnership property and became such. Hayes v. Treat, 178 Pa. 310, 35 Atl. 987.

Other states hold that where property is purchased with partnership funds and title taken in the partnership name, it is partnership property insofar as title in equity is concerned. Carpenter v. Zarbuck, 74 Ark. 474, 86 S. W. 299; McRae v. Stillwell, 111 Ga. 65, 36 S. E. 604, 55 L. R. A. 513; Taylor v. Donley, 83 Kan. 646, 112 Pac. 595, 21 A. & E. Ann. Cas. 1241; La Fayette Land Co. v. Caswell, 59 Fla. 544, 52 So. 140, 138 Am. St. R. 166; Close v. O'Brien & Co., 135 Iowa 305, 112 N. W. 800.

It has been said that the conveyance of land to a partnership for a consideration vests title in the members as tenants in common for the use and benefit of the partnership. Adams v. Church, 42 Ore. 270, 70 Pac. 1037, 59 L. R. A. 782, 95 Am. St. R. 740.

And where the deed is to a partnership and thus embraces the surnames of some but not all of the partners, those whose surnames are indicated hold for the benefit of the partnership. A. J. Dwyer Pine Land Co. v. Whiteman, 92 Minn. 55, 99 N. W. 362; Dunlap v. Green, 60 Fed. 242, 8 C. C. A. 600.

Where the partnership is merely fictitious, it is not recognized in law as a person and it is necessary to correct by bill in equity so that the true names of the grantees may be inserted. Spaulding Mfg. Co. v. Godbold, 92 Ark. 63, 121 S. W. 1063, 29 L. R. A. (N. S.) 282, 135 Am. St. R. 168, 19 A. & E. Ann. Cas. 947; Walker & Miller, 130 N. C. 448, 52 S. E. 125, 1 L. R. A. (N. S.) 157, 111 Am. St. R. 805. See also Wray v. Wray, 93 L. T. (N. S.) 304, 74 L. J. Ch. (N. S.) 687.

If a member of a partnership, without the knowledge of the other, uses partnership money to purchase real estate and the deed is made to his wife, it will be treated as partnership assets. Am. Nat. Bank v. Thornburrow, 109 Mo. App. 639, 83 S. W. 771; Claflin v. Ambrose, 37 Fla. 78, 19 S. E. 628.

Resulting trust in land in favor of partnership may be shown by parol evidence. Van Buskirk v. Van Buskirk, 148 Ill. 9, 35 N. E. 383; Hodgson v. Fowler, 24 Colo. 278, 50 Pac. 1034; Foster v. Sargent, 72 N. H. 170, 55 Atl. 423.

And where land is purchased for partnership purposes, the partners *inter sese* are trustees. McPherson v. Swift, 22 S. D. 165, 116 N. W. 76, 133 Am. St. R. 907.

The general doctrine in England is for the conversion of partnership realty into personalty and this has been declared by statute. But in America this is only to the extent that realty is needed for partnership debts. This has been declared in a great number of cases, of which there are cited the following: Galbraith v. Tracy, 153 Ill. 54, 38 N. E. 937, 28 L. R. A. 129, 46 Am. St. R. 867; Darrow v. Calkins, 154 N. Y. 503, 49 N. E. 61, 48 L. R. A. 299, 61 Am. St. R. 637; Woodward Holmes Co. v. Nudd, 58 Minn. 236, 59 N. W. 1010, 27 L. R. A. 340, 49 Am. St. R. 503.

The policy appears to be as greatly as possible to recognize existing business conditions and not to admit of any technical obstructions to resolving matters according to actual facts in transactions by partnerships. C.

CORRESPONDENCE.

PREVENTIVE JUSTICE—DECLARING THE RIGHTS OF PARTIES.

A. H. Robbins, Esq.,

Editor Central Law Journal.

Dear Mr. Robbins:

I have long been interested in the subject of preventive justice of which Professor Sunderland's proposition (88 Cent. L. J. 6), is but one phase. I urged this matter as far back as 1906 in a paper read before the American Bar Association and have been urging it steadily ever since. After all it is by no means as novel as you might suppose. In the old common-law writ of quo jure it was possible to try the validity of a claim of an easement as a pure matter of obtaining a judicial declaration that there was or was not the easement claimed without any judgment for damages and without any trespass such as we now require to raise the question. When our real actions became obsolete this went along with them. But with the common law precedent of the writ of quo jure, the equitable precedent of instructions to trustees, the example of the English practice under Order 54a, and the corresponding practice in Canada, there is very little warrant for saying that so obvious and convenient an expedient is alien to the genius of Anglo-American law.

In the same connection you should look at an article entitled "The Declaratory Judgment —A Needed Procedural Reform," in 28 Yale Law Review, 1.

Yours very truly,

ROSCOE POUND.

Cambridge, Mass.

BOOKS RECEIVED.

Federal Military Pensions in the United States. By William H. Glasson, Ph.D., Professor of Political Economy and Social Science, Trinity College, North Carolina. Edited by David Kinley, Professor of Political Economy, University of Illinois; Member of Committee of Research of the Carnegie Endowment. New York: University Press. Price, $2.50 net.

HUMOR OF THE LAW.

"The profiteers," said Representative Mudd, of Maryland, "are catching it on all sides. When a profiteer attempts to chide some attacking Congressman or Senator, he catches it as badly as Mrs. Merryweather.

"'John,' said Mrs. Merryweather, indignantly, 'why did you tell Harriet Witherspoon that you married me because I was such a good cook?'

"'Well,' said Merryweather, 'I had to have some good excuse, didn't I?'"

A few years ago, one of the circuits of the state of Arkansas was graced by a judge who was long on admitting new attorneys to practice in his court; in fact, it was a standing joke that no applicant could display ignorance enough in his examination to cause him to fail. One of these newly made lawyers had stationery gotten out in keeping with his standing in the profession, and after a short time he received, by mail, an abstract from a party in another state, asking for a written opinion as to the title of the land described in the caption, and requested an early answer, as he had an opportunity to trade for this property, and the deal would rest upon the report of the attorney, who replied as follows:

"I have made a very careful examination of the title to this property as shown by the abstract and have to advise that you exercise some caution in making this deal, for I do not find the title good; the very first sheet of this abstract shows that the land was first transferred by A. Lincoln, and it fails to state he was unmarried; this should have been done, if that was the fact, and if not his wife should have joined in the conveyance; this is required in Arkansas, and I consider this deed or conveyance worthless. This conveyance was made in 1862, a great many years ago, and it is natural to presume that Lincoln is dead, and if he left any children, I presume they are scattered; to correct this error it will be necessary to get a quit claim deed from all the heirs of Mr. Lincoln, or go into a court of chancery and have the title quieted, which is frequently done; if you make the deal I would suggest you hold back at least $30 to cover this expense."

We are not advised as to whether the party made the trade or whether he investigated sufficiently to ascertain whether or not A. Lincoln was dead.

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Acknowledgment** — Collateral Contract. — An officer taking an acknowledgment to a deed is incompetent to impeach his act in a collateral proceeding, but in direct proceeding to set aside deed he is competent to show that he was imposed upon and honestly led to believe that one acknowledging deed was the person named therein.—Mankin v. Davis, W. Va., 97 S. E. 296.

2. **Action**—Tort and Contract.—It is improper to unite in the same declaration a cause of action sounding in contract with one sounding in tort.—Shafer v. Security Trust Co., W. Va., 97 S. E. 290.

3. **Attorney and Client**—Stipulation.—Attorneys may stipulate that an action shall abide the event of another action, if controlling issues are those involved in such other action.—National Council of Knights and Ladies of Security v. Scheiber, Minn., 169 N. W. 272.

4. **Bailment**—Mandatory.—Where contract is one for work and labor, to be performed on plaintiff's property, an action of trover by plaintiff will lie against a third person buying the property from party agreeing to perform the work and labor.—Gilbert v. Copeland, Ga., 97 S. E. 251.

5. **Bankruptcy**—Implied Contract.—Where the principal wrongdoer has become bankrupt, and plaintiff has proved his claim as upon an implied contract and received dividends, he cannot thereafter maintain action in tort against those having assisted the principal wrongdoer in converting the property.—Shonkweiler v. Harrington, Neb., 169 N. W. 258.

6.——Insolvency.—An insolvent debtor, who undertakes to raise funds and compound his indebtedness, should keep accurate accounts, showing what he received and disbursed, and his failure to do so will count heavily against his assertion of honesty and good faith towards his creditors.—In re Bloomberg, U. S. D. C., 253 Fed. 94.

7.——Jurisdiction.—A referee has jurisdiction of a bill by the trustee to avoid a transfer in fraud of creditors.—Graham v. Faith, U. S. C. C. A., 253 Fed. 32.

8.——Title in Trustee.—In the absence of fraud, a trustee takes the property in the same plight and condition, and subject to the same liens and equities, as when the bankrupt held it.—In re Roseboom, U. S. D. C., 253 Fed. 136.

9. **Banks and Banking** — Collection. — Bank holding note for collection is owner's agent.—Belk v. Capital Fire Ins. Co., Neb., 169 N. W. 262.

10.——Forgery.—A drawee of a forged check, who has paid it to a bona fide holder for value and without fault, cannot recover the payment.—Commercial & Savings Bank Co. of Bellefontaine, Ohio, v. Citizens Nat. Bank of Franklin, Ind., 120 N. E. 670.

11. **Bastards**—Special Proceeding.—A bastardy proceeding is a special proceeding governed by the rules of pleading and practice applicable to civil actions.—Wilson v. State, Okla., 175 Pac. 829.

12. **Bills and Notes**—Burden of Proof.—Where fraud in procurement of note is set up as defense in suit thereon by indorsee, latter has burden to show his protection from defense as good-faith purchaser for value before maturity.—Brumbaugh v. Mellinger, Ind., 120 N. E. 676.

13. **Cancellation of Instruments**—Equity.—Application for cancellation of contract is addressed to sound discretion of court of equity.—Stimpson v. Stimpson, Wis., 169 N. W. 295.

14. **Carriers of Goods**—Delay.—It is the duty of carriers to transport goods offered for shipment within a reasonable time and in a proper car considering the season.—Bivens Bros. v. Atlantic Coast Line R. Co., N. C., 97 S. E. 215.

15.——Milling in Transit.—Milling in transit is not an unusual privilege granted by railroads to their patrons, and it is not unusual or unjust for the Railroad Commission to impose such an obligation upon railroads if the rates are compensatory for the additional burden.—Empire Rice Milling Co. v. Railroad Commission of Louisiana, La., 79 So. 833.

16.——Published Rates.—Carrier may recover regular rate for interstate shipment as shown by schedule on file with Interstate Commerce Commission under Interstate Commerce Act, though lower rate was quoted by carrier to shipper at time of shipment.—Southern Ry. Co. v. Latham, N. C., 97 S. E. 234.

17. **Charities**—Execution of Trust.—It is no objection to execution of trust for erection of place of worship for a local religious society, sole beneficiary, that a building is now provided for such society in the city, and held by other trustees. — Attorney General v. Armstrong, Mass., 120 N. E. 678.

18. **Commerce** — Intoxicating Liquor. — The federal statute known as the "Webb-Kenyon Act" (U. S. Comp. St. 1916, § 8739), relating to

intoxicating liquors, does not restrain, limit, or nullify Code Supp. 1918, c. 32a, § 31 (sec. 1305e), relating to offense of bringing into state or carriage of more than one quart of liquor per month.—Ex parte Pratt, W. Va., 97 S. E. 301.

19. **Conspiracy** — Selective Draft. — A conspiracy to prevent persons of draft age from registering as required by law is one to defraud the United States by obstructing a "function of the government."—Firth v. United States, U. S. C. C. A., 253 Fed. 36.

20. **Constitutional Law**—Political Question.—The question of the sovereignty of a foreign government is a political question determination of which by the executive or legislative department of the United States government binds the judicial department.—Agency of Canadian Car & Foundry Co. v. American Can Co., U. S. D. C., 253 Fed. 152.

21. **Contracts**—Capacity to Contract.—A party entering into contract is presumed to have capacity to contract, and burden is on those asserting his incapacity to prove it.—Cushing v. McWaters, Okla., 175 Pac. 838.

22.—False Representation.—One signing a written instrument without reading it, upon a false representation by the other party as to its contents or scope, is not bound thereby.—Grant Lumber Co. v. North River Ins. Co. of New York, U. S. D. C., 253 Fed. 83.

23.——Misrepresentation.—Where the proof shows that complaining party knew the real facts of case when he entered into a contract, he cannot avoid it on ground of fraud or misrepresentation.—McFadden v. Heisen, Idaho, 175 Pac. 814.

24.——Intention.—In construing contracts, the intention of the parties should be ascertained and enforced.—Nelson v. Nelson, Wis., 169 N. W. 278.

25.——Performance.—Where an agreement imposes a duty upon the parties, they must show performance before they can claim rights thereunder.—Pearson v. Easterling, S. C., 97 S. E. 238.

26.——Periodical Payments.—Where construction contract required payments to be based on estimate of railroad's engineer, and made it conclusive and a condition precedent to action, contractor might bring action, where estimate was fraudulent or so grossly inaccurate as to imply bad faith.—Vaughan Const. Co. v. Virginian Ry. Co., W. Va., 97 S. E. 278.

27. **Contribution** — Joint Tort-Feasors. — As between "joint tort-feasors" in pari delicto, which means persons who by concert of action intentionally commit the wrong complained of, there is no right of contribution.—Hobbs v. Hurley, Me., 104 Atl. 815.

28. **Corporations** — Waiver. — A stockholder does not waive his right to maintain his proportionate share of stock by failure to bid on stock reissued and sold at a bonus, particularly where the condition of the corporation's books prevents determination of the real value of the stock.—Dunn v. Acme Auto & Garage Co., Wis., 169 N. W. 297.

29. **Courts**—Local Law.—Whether state constitution gave consent of state to be sued is a question of local state law, decision of which by state Supreme Court is controlling with federal courts; no federal right being involved.—Palmer v. State of Ohio, U. S. S. C., 39 S. Ct. 16.

30.——Local Rules.—Where mining rights are granted in view of a local rule of the state, such rule will be followed by the federal courts in construing the grant, whether or not it is to be considered strictly as a rule of property.—Marquette Cement Mining Co. v. Oglesby Coal Co., U. S. D. C., 253 Fed. 107.

31.——Opinions.—Statements in opinion of Supreme Judicial Court in illustration of questions actually decided are seldom considered in all their bearings, and must be restricted to propositions decided.—Attorney General v. Armstrong, Mass., 120 N. E. 678.

32. **Covenants**—Running with Land.—A covenant of warranty is a real covenant running with the land until broken.—Merchants' Nat. Bank of Clinton, Iowa, v. Otero, N. M., 175 Pac. 781.

33. **Criminal Law**—Abatement.—The purpose of a criminal proceeding being to punish the defendant in person, the action must necessarily abate upon his death pending determination of his appeal.—Herndon v. State, Okla., 175 Pac. 842.

34.——Abatement.—Objection to indictment, found by grand jury in selection of which irregularity occurred, was properly presented by plea in abatement.—Duffey v. State, Ind., 120 N. E. 658.

35.——Admission by Silence.—Where defendant was charged by the mother of deceased with illicit relations with wife of deceased, and failed to deny the charge, it was properly received as an admission by silence.—State v. Kidd, N. M., 175 Pac. 772.

36.——Autrefois Acquit.—Indictment naming a date of sale of liquor between certain dates, both subsequent to return of indictment to which accused pleaded guilty, limits the charge to sales after former indictment, and would not be subject to plea of autrefois convict.—Cook v. State, Ga., 97 S. E. 258.

37.——Defendant as Witness.—The law casts no suspicions on defendant's evidence, and his testimony must stand or fall upon its merits.—Jennings v. State, Miss., 79 So. 814.

38.——Judicial Notice.—The courts take judicial notice that whiskey is both spirituous and intoxicating, and no proof of these facts need be made in any case.—Stoker v. State, Ga., 97 S. E. 273.

39.——Other Acts.—To make evidence of other acts available in a criminal prosecution, some use for it must be found as evidencing a conspiracy, knowledge, design, plan, or some other quality of itself evidence bearing upon the particular act charged.—Clark v. State, Neb., 169 N. W. 271.

40.——Principals in Misdemeanor.—All procuring, commanding, or aiding the commission of a misdemeanor are principals.—Littlefield v. State, Ga., 97 S. E. 259.

41.——State and Federal Law.—An act forbidden by a federal statute and a state statute, each designed to establish and enforce the same principle of public policy, may constitute two

offenses, one against the federal government, and another against the state.—Ex parte Pratt, W. Va., 97 S. E. 301.

42. **Dedication**—Intent.—To constitute an implied dedication of land to use for a public highway, there must be an intent on the part of the owner to appropriate the land for a public use.—Burk v. Diers, Neb., 169 N. W. 263.

42. **Deeds** — Defeasible Fee.—Since deed to daughter and the heirs of her body, if any, if not, then to her nearest kin, conveyed a defeasible fee, conveyance by daughter would pass complete title, provided daughter leaves living issue. —Smith v. Parks, N. C., 97 S. E. 209.

44.——Limitation of Terms.—The grantor, if wishing to limit the effect of words sufficient on their face to convey a fee, should express the limitation in the instrument.—State of Georgia v. Trustees of Cincinnati Southern Ry., U. S. S. C., 39 S. St. 14.

45.——Undue Influence.—The undue influence for which a deed or will may be avoided must be such as effectually deprives the grantor or testator of the exercise of his free will and coerces him to substitute another's will for his own.—Ludwig v. Bressler, U. S. C. C. A., 253 Fed. 8.

46. **Divorce**—Misconduct.—Misconduct of defendant wife may be considered by the court on division of the property.—Roder v. Roder, Wis., 169 N. W. 307.

47.——Separate Domicile.—A married woman may lawfully acquire a separate domicile, when the misconduct of her husband compels her to leave him, or when he abandons her.—George v. George, La., 79 So. 832.

48. **Eminent Domain**—Additional Servitude.—The maintenance of a telephone line is an additional servitude to the public easement in a highway.—Hurlbut v. Union Telephone Co. of Prairie du Chien, Wis., 169 N. W. 308.

49. **Equity**—Laches.—What length of time will constitute a defense on the ground of laches must be determined by the circumstances of each case, and is addressed to the sound discretion of the chancellor.—Cowan v. Union Trust Co. of San Francisco, Cal., 175 Pac. 799.

50.——Parties.—A court of equity will on its own motion dismiss a bill, if to grant the relief prayed for would injuriously affect persons materially interested in the subject-matter who are not made parties.—United States v. Bean, U. S. C. C. A., 253 Fed. 1.

51. **Estoppel**—Accepting Benefits.—Where defendant city accepted benefits of stipulation made before railroad commission between plaintiff having permit to do public lighting in city and a rival company, and the fruit of plaintiff's action prosecuted in reliance thereon, it would be unconscionable to permit the city to repudiate plaintiff's established right, to which it cannot be restored or be awarded a complete, adequate, and efficient remedy at law.—Oconto Electric Co. v. City of Oconto, Wis., 169 N. W. 293.

52.——Waiver.—"Waiver" implies knowledge of the material facts and of one's rights, and a willingness to refrain from enforcing those rights, and is a voluntary surrender of known rights.—Maxwell v. Dirigo Mut. Fire Ins. Co., Me., 104 Atl. 812.

53. **Executors and Administrators**—Breach of Trust.—Failure of an administrator to make returns is an omission of duty and a breach of trust.—Dubberly v. Varnedoe, Ga., 97 S. E. 261.

54. **Exemptions**—Head of Family.—A wife, living with her husband and children, is not the head of the family, and is not entitled, under Civ. Code 1910, § 3416 et seq., to have property to which she has title exempted for benefit of herself and minor children.—Sheppard v. Davis, Ga., 97 S. E. 262.

55. **False Pretenses**—Acts or Conduct.—Acts or conduct may constitute false pretenses.—Stecher v. State, Wis., 169 N. W. 287.

56. **Fraud**—Deceit.—Where defendant, with intent to induce plaintiff to buy stock, made false representations as to value of the stock, and plaintiff relied thereon and was thereby induced to make the purchase, defendant would be liable for damages for deceit, although he did not know at the time he made the representations that the stock was not worth the amount stated by him.—Bechman v. Salzer, Wis., 169 N. W. 279.

57. **Fraudulent Conveyances** — Anticipating Obligation.—If a deed of trust of realty or personality is executed in anticipation of creditor's liability to a third person and to defraud him, it may be set aside as fraudulent and void as to such third persons.—Mankin v. Davis, W. Va., 97 S. E. 296.

58. **Gaming**—Deliyery of Grain.—Delivery of grain to elevator company to be paid for on demand at the price then prevailing is not within the anti-gambling statute.—Dvorak v. Dobson, Neb., 169 N. W. 259.

59. **Gifts**—Causa Mortis.—Gifts causa mortis, clearly proved, or admitted, are valid and operated against all but creditors, unless they may be invalidated for fraud.—Lambert v. Lambert, Me., 104 Atl. 820.

60. **Homestead** — Trust Property. — Mother could not legally declare property held by her in trust for her daughters a homestead.—Oree v. Gage, Cal., 175 Pac. 799.

61. **Infants**—Next Friend.—While the next friend has power to employ counsel to prosecute the action, and it is his duty to do so, he cannot make a binding contract for compensation. —In re Stone, N. C., 97 S. E. 216.

62. **Innkeepers**—Hotels and Lodging Houses. —Renting rooms to registered guests at fixed charges per day in a building open to the public, wherein an office, lobby, and parlor are maintained, although no meals are served, constitutes running a "hotel," and not a "lodging house"; a "lodging house" keeper specially dealing with his customers by personal contracts for the nature of the accommodation, the duration of the stay, and exercising the right to reject applicants at pleasure.—Huntley v. Stanchfield, Wis., 169 N. W. 276.

63. **International Law** — Revolution. — The principle is firmly established in our courts that the rights and liabilities of a state are unaffected by a change either in the form or personnel of its government, however accomplished, whether by revolution or otherwise.—Agency of

Canadian Car & Foundry Co. v. American Can Co., U. S. D. C., 253 Fed. 152.

64. **Landlord and Tenant**—Tenancy.—Where agreement to rent building for $4 a month was indefinite as to duration, the tenancy was from month to month.—Lay v. Great Southern Lumber Co., Miss., 79 So. 822.

65.——Tenancy at Will.—A tenant's possession under a void or defective lease for a term creates a tenancy at will, which, if rent is paid, becomes a tenancy from year to year.—Guffey v. Pollan, Okla., 175 Pac. 817.

66. **Larceny**—Generic Name.—The use of the generic name "hog" is a sufficient description, under Rev. St. 1913, § 8640, providing punishment for stealing a "sow, barrow, boar or pig."—Clark v. State, Neb., 169 N. W. 271.

67. **Libel and Slander**—Special Damage.—In action for slander, where alleged slanderous words charged bastardy, but did not, of themselves, charge indictable offense, plaintiff could not recover, without alleging and proving special damage.—Payne v. Thomas, N. C., 97 S. E. 212.

68. **Limitation of Actions**—Accrual of Action.—Whenever one party to a contract may rightfully sue another thereon, a cause of action has accrued, and the statute of limitations begins to run.—Patterson v. Bonner, Okla., 175 Pac. 826.

69.——Temporary Absence.—Where husband has a permanent residence in state where personal service may lawfully be made upon wife, and there is no estrangement or separation, her temporary absence to care for sick son in another state will not interrupt statute of limitations in suit by judgment creditor to sell her land located in the state—Bent v. Read, W. Va., 97 S. E. 286.

70. **Mandamus**—Evidence.—The existence of facts imposing a legal duty justifying a writ of mandate must be shown by clear and positive evidence, covering every necessary fact, leaving no room for conjecture.—Smith v. State, Ind., 120 N. E. 660.

71. **Maritime Liens**—Admiralty.—A contract cannot afford the necessary basis for a maritime lien, unless it is maritime in its nature as to all its provisions, so as to be cognizable in admiralty.—The Walter Adams, U. S. C. C. A., 253 Fed. 20.

72. **Master and Servant**—Assumption of Risk.—A railroad section hand does not assume the risk of injury from falling ties, released by breaking of standard on side of passing flat car.—Yazoo & M. V. R. Co. v. McCaskell, Miss., 79 So. 817.

73.——Contributory Negligence.—The question of servant's contributory negligence, where not affirmatively shown in the complaint, is a matter to be alleged by the master, and need not be negatived by plaintiff.—Jackson Hill Coal & Coke Co. v. Van Hentenryck, Ind., 120 N. E. 664.

74.——Scope of Employment.—An agent engaged in that which he was employed to do is acting "within the scope of his employment."—Adams v. Foy & Shemwell, N. C., 97 S. E. 210.

75. **Mortgages**—Redemption.—By reason of the right by descent which under Rev. St. c. 80, § 17, a widow has in land mortgaged by her husband before marriage, she during marriage has a right of redemption, as regards the running of time therefor against mortgagor in adverse possession.—Batchelder v. Bickford, Me., 104 Atl. 819.

76. **Municipal Corporations**—Sidewalks.—Persons using sidewalks are required to take notice of the conditions as to location of lights and of water hydrants.—Rollins v. City of Winston-Salem, N. C., 97 S. E. 211.

77. **Officers**—Vacancy.—Where office of circuit court commissioner became vacant, because of acceptance by incumbent of United States office no proceedings were necessary to declare the office vacant.—State v. Turner, Wis., 169 N. W. 304.

78. **Partition**—Premature Partition.—Premature partition may be treated as a nullity and the land again made subject to partition.—Gist v. Gist, S. C., 97 S. E. 240.

79. **Patent**—New Use.—While one who, by enlarging size of patented article, makes it suitable for new use, is not entitled to patent, yet, where inventor combines new element with old device, whereby new and useful result is obtained, there is invention, which is patentable.—Liquid Carbonic Co. v. Gilchrist Co., U. S. C. C. A., 253 Fed. 54.

80.——Patentability.—The mere fact that human agency intervenes in an operation does not render a combination unpatentable, nor is it necessary that the action of the elements be simultaneous, nor that one of the elements shall so enter into the combination as to change the action of the others; but it is sufficient if there be some joint operation of the elements producing a result due to their co-operative action.—Willard v. Union Tool Co., U. S. C. C. A., 253 Fed. 48.

81. **Physicians and Surgeons**—Choice of Means.—Physicians are not compelled to choose at their peril between two accepted methods of treatment.—De Bruine v. Voskuil, Wis., 169 N. W. 288.

82. **Principal and Agent**—Undisclosed Principal.—An undisclosed principal is liable for property obtained through contract of his agent, though made by the agent in his own name, and though the owner of the property understood that he was selling to the agent.—Dworak v. Dobson, Neb., 169 N. W. 259.

83. **Process**—Foreign Corporation.—Officer of a foreign corporation, coming into state to testify in action wherein corporation is plaintiff, is privileged from service of summons in another action against corporation in county in which he is attending as witness, although he is not subpoenaed.—Lonsdale Grain Co. v. Neil, Okla., 175 Pac. 823.

84. **Railroads**—Interurban Line.—The care required of persons approaching railroad tracks along which gasoline motorcars are operated is the same as that required when the cars are operated by electric power along interurban lines.—Christman v. Southern Pac. Co., Cal., 175 Pac. 808.

85. **Receivers**—Appointment.—Courts of equity exercise extreme caution in appointment of receivers ex parte, being adverse to dispossess a party of property prima facie his own without notice, and such action should be taken only in case of greatest emergency.—Kent Avenue Grocery Co. v. Geo. Hitz & Co., Ind., 120 N. E. 659.

86. **Reformation of Instruments**—Discretion.—The right to the reformation of an instrument is not absolute, but depends on an equitable showing.—Tatum v. City Building & Loan Ass'n, Fla., 79 So. 839.

87. **Sales**—Executory Sale.—Where the contract involved is one for the executory sale of merchandise, an action of trover will not lie against a third person purchasing from seller.—Gilbert v. Copeland, Ga., 97 S. E. 251.

88.——Rescission.—If purchaser induced to buy by fraud elects to rescind, he must completely restore everything of value he has received.—Brumbaugh v. Mellinger, Ind., 120 N. E. 676.

89. **Specific Performance**—Discretion.—The specific performance of a contract to convey an interest in real estate is not a matter of right, but rests in sound reasonable discretion of a court of equity.—Dixie Naval Stores Co. v. German-American Lumber Co., Fla., 79 So. 836.

90. **Statutes**—Interpretation.—In the interpretation of statutes, the whole body of previous and contemporaneous legislation should be considered.—Haswell v. Walker, Me., 104 Atl. 810.

91. **Usury**—Corrupt Bargain.—A corrupt bargain, to contravene the statute, is essential to sustain a plea of usury, and a withholding of a part of a loan as a bonus, without a previous agreement, does not constitute usury.—Dunlap v. Chenoweth, N. J., 104 Atl. 822.